IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1971

Docket No.

JOEL BERNARD REISMAN,

Petitioner,

v.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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SUPREME COURT OF THE UNITED STATES

JOEL BERNARD REISMAN,

Petitioner,

-against-

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, Joel Bernard Reisman, prays that a writ of certiorari issue to review a final judgment and order of the Court of Appeals of the State of New York entered November 18, 1971, (Appendix A, infra), which affirmed an order of the Supreme Court of the State of New York, Appellate Division, Second Department, entered on October 19, 1970, affirming a judgment of conviction rendered against Petitioner in the Supreme Court of the State of New York, Queens County, on September 14, 1968, convicting petitioner after trial by jury, of criminal possession of a dangerous drug in the first degree.

OPINION BELOW

The opinion of the said Court of Appeals of the State of New York is reprinted herein in Appendix B, infra. This opinion is contained in People v. Reisman, reported in 29 N.Y. 2d 278 (1971).

JURISDICTION

The judgment and order of the Court of Appeals is dated and was entered November 18, 1971. The jurisdiction of this Court is invoked, made and conferred under 28 U.S.C. 1257 (3) and Rule 22(1) of the Rules of the Supreme Court of the United States.

QUESTIONS INVOLVED

1. Whether the government of one state may use in a criminal prosecution evidence seized by its police pursuant to information received in cooperation with the police of a sister state who initially seized that same evidence in violation of the Fourth Amendment and where the highest court of that sister state ordered suppression of that same evidence.

2. Whether the possibility that the police might have made an arrest on information hypothetically received from an independent source entitles them to use evidence actually seized in reliance on information secured during a police search in violation of the Fourth Amendment.

3. Whether a search made by an airlines employee in cooperation with, and pursuant to police request, for the sole purpose of aiding the police in the discovery of marijuana, is a private search outside the proscriptions of the Fourth Amendment.

4. Whether the failure of the police to secure a warrant for the search of the packages and the seizure of Petitioner, when they had planned in advance to make the arrest and search, when they had ample time to secure the warrant, and when the evidence was in no danger of destruction or loss, requires that the evidence thus seized be suppressed.

5. Whether petitioner's conviction for possession of a

package containing marijuana at the airport where he had just claimed it for the addressee, deprived him of due process of law when there was no evidence that he had any knowledge of the contents of the package.

CONSTITUTIONAL AMENDMENTS

AMENDMENT IV

Searches and Seizures

The right of the people to be secure in their persons, houses, papers and effects (against unreasonable searches and seizures), shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV

CITIZENSHIP: PRIVILEGES AND IMMUNITIES DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of any citizen of the United States; nor shall any State deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

NEW YORK STATE STATUTE (PENAL LAW)
Section 220.20

CRIMINAL POSSESSION OF A DANGEROUS DRUG IN THE FIRST DEGREE:

A person is guilty of criminal possession of a dangerous drug in the first degree when he knowingly and unlawfully possesses a narcotic drug consisting of (a) one hundred or more cigarettes containing cannabis; or (b) one or more preparations, compounds, mixtures or substances of an aggregate weight of (i) one or more ounces, containing any of the respective alkaloids or salts of heroin, morphine or (ii) one or more ounces, containing cannabis, or (iii) two or more ounces, containing raw or prepared opium, or (iv) two or more ounces, containing one or more than one of any of the other narcotic drugs.

Criminal possession of a dangerous drug in the first degree is a class C felony. L. 1965, c 1030, eff. Sept. 1, 1967.

STATEMENT OF THE CASE

Petitioner, Reisman, was arrested with Mario Di Eramo on February 12, 1968, at Kennedy airport in New York. On February 29, 1968, he and his co-defendant were indicted in the New York Supreme Court, Queens County, on three counts of criminal possession of a dangerous drug in the first, second and fourth degrees. They were arraigned on that indictment March 20, 1968, and on September 4, 1968, a hearing was begun on petitioner's motion to suppress the evidence.

Richard Dunkel, an American Airlines freight agent at Los Angeles International Airport, testified at the suppression hearing that he accepted from a "hippie type" two packages for shipment to New York on February 11, 1968 (A62, 78).*

*( ) All "A" numbered references are to pages in the record on appeal.

The "hippie type" was later identified as John Peter Abt. The packages were addressed to another person in care of petitioner herein.

Dunkel further testified that he had had several prior conversations with California narcotics policemen about marijuana shipments coming through his office. "Whenever they did come in on previous shipments that they picked up at the airport". (A76). Although his supervisor had never advised him as to a policy concerning possible shipments of marijuana (A74), and although his supervisor declined to take responsibility for his opening the specific package deposited by John Peter Abt, leaving it up to him; the police had told him to be on the lookout for "any suspicious people or hippie type looking people" who might be engaged in shipping marijuana (A73-74, 78, 86). He thought he had a right to open and inspect any packages (A62).

Mr. Dunkel opened only one of the two Abt packages and saw therein what he assumed was marijuana. He then told his supervisor who called the police. A policeman named Wanak came, inspected the packages already opened by Dunkel and then opened the other package. The Los Angeles police verified there was marijuana in the packages (A70-75). The police did not show Dunkel a search warrant, nor was he aware that anyone was under arrest (A81).

Detective Michael Tobin testified that on the night of February 11, 1968, at 11:45 P.M. he received a telephone call from Sergeant Fred McKnight of the Los Angeles police department. Detective Tobin knew Sergeant McKnight, whom he had met in Los Angeles with whom he had had dealings "dozens of times", and who had supplied him with reliable information leading to convictions on numerous occasions (A10-11, 41). McKnight told Tobin that two cartons were due to arrive at Kennedy Airport, the contents of one he had seized and replaced with sand, and the contents of the other

he had filled with twenty-three bricks of marijuana (A52). McKnight told Tobin that nobody had been arrested, and Tobin didn't know if there had been a warrant for the search in Los Angeles; an airlines employee had found the marijuana (A54). Detective Tobin further testified that Sergeant McKnight may have told him about initialed markings on the bricks, since this was the procedure they had used on other occasions (A55). McKnight described the shipment, the quantities, the names of the consignees (George Carlton c/o Tanker Reisman), the flight time and number, and the number on the air bill (A57, 59, 60).

Detective Tobin further testified that the next morning at 6:30 A.M. he went to Kennedy Airport; the packages arrived at 7:00 A.M. He saw the previously described boxes and he smelled the odor of marijuana emanating from one of them (A12, 14, 27-28). Detective Tobin kept the cartons under observation for sixteen hours until petitioner arrived at 11:00 P.M., during which time he made no attempt to obtain a search warrant or arrest warrant (A14, 35). When he arrived at the airport petitioner identified himself to Detective Tobin, who was dressed as an American Airlines employee. Petitioner signed an air bill, picked up the package and was arrested as he was carrying it to his car (A13-21). Detective Tobin searched Petitioner and found on his person a check payable to petitioner with an endorsement to Peter Abt (A25-27).

Detective Tobin further testified that all his information on this case came from the Los Angeles police (A41, 59).

Petitioner's motion to suppress the evidence was denied on September 14, 1968, and trial was begun on December 16, 1968, wherein the testimony of Detective Tobin was substantially the same as that he gave at the suppression hearing. In addition, two agents of the Federal Bureau of Narcotics and Dangerous Drugs who had assisted Detective Tobin at Kennedy Airport, Agents Robert C. Manning and

Frances E. White, corroborated the facts testified to by Detective Tobin.

Patrolman Manfred Fisher, a police chemist, testified at the trial that the packages seized by Detective Tobin contained ninety-five pounds of marijuana (A94-103).

Petitioner did not testify, but his co-defendant Mario DiErano testified he was accompanying petitioner to the airport and knew nothing of the specific nature of Petitioner's errand. He was acquitted of all charges.

Petitioner was found guilty of the first count of the indictment and not guilty of the second count; the third count had been dismissed by the trial judge. On May 13, 1969, petitioner was sentenced to five years imprisonment.

PROCEEDINGS IN CALIFORNIA

The airlines clerk, Richard Dunkel, had written down the license plate number of the car driven by John Peter Abt, after the latter deposited the cartons with him. Abt was arrested in California and his motion to suppress the evidence was denied by the California Superior Court. On appeal, to the Supreme Court of California, a writ of mandate was issued by that Court directing the Superior Court of Los Angeles "to suppress the marijuana seized at the airport and the fruits of the seizure" (A144-147). John Peter Abt v The Superior Court of Los Angeles County, 82 Cal. Rptr. 481, 1 Cal. 2d 418, 462 P 2d 10. The California Supreme Court basing its decision on the failure of the Los Angeles police to obtain a search warrant for the cartons at the Los Angeles airport, expressly recognized, but did not resolve, the question of the nature of the search conducted on behalf of the police by the airlines clerk.

REASONS FOR GRANTING THE WRIT

After a search conducted by the Los Angeles police later determined to be unlawful by the California Supreme Court (Abt. v The Superior Court of Los Angeles County, 82 Cal Rpter 481) and assumed to be unlawful by the courts of New York State in their deposition of this Case, the Los Angeles police forwarded the evidence seized and altered to New York and informed the New York police of the circumstances surrounding the seizure. Pursuant to that information the New York police arrested petitioner herein, seized same evidence and used that evidence in the instant prosecution of petitioner. The writ of certiorari should issue because notwithstanding testimony to the effect that the New York police and the Los Angeles police were involved in a continuing scheme of cooperation in this case and in cases such as this one, the holding of the New York State Court of Appeals (see Appendix herein) is that a search and seizure by the Los Angeles police in violation of the Constitution should not "handicap" the police in New York. We submit that such a holding defeats the effort of the California Supreme Court to insure the obedience of its law enforcement authorities to the Federal Constitution, when that Court specifically held the search and seizure in California to be unlawful, suppressed the evidence thus obtained and reversed the judgment of conviction in California against one John Peter Abt. The effect of the New York Court of Appeals decision is to sanction invasions of Fourth Amendment rights by the police of another state, since the fruits of those invasions, whether or not admissable in that other state may be handed over to the New York police. Whenever the prosecution is to take place in New York, the California police are free to operate outside the proscriptions of the Fourth Amendment. Such a result is directly contrary to this Court's interpretation of the exclusionary rule's application to inter-jurisdictional criminal prosecutions. In Elkins v United States, 364 U.S. 206 (1960), articles obtained as the result of an unreasonable search and

seizure by state officers could not be introduced in evidence against a defendant in a federal criminal trial. This rule mandated so "there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigations" Elkins v United States, supra, at 222, cf. Rea v United States, 350 U.S. 214 (1956). This Court quoted with approval in Elkins the statement of Mr. Justice Cardozo, "The professed object of the trespass rather than the official character of the trespasser should test the rights of government." People v Defore, 242 N.Y. 13, 22-23 (1926). The view of the New York Court of Appeals is that the New York police who did not make the actual illegal search of the packages in California (upon which appeared petitioner's name and the New York destination*), were thus entitled to proceed in New York against petitioner insulated from the illegal conduct of the California police upon whom they depended for their information. This view is directly in conflict with the rationale of this Court's recent decision in Whitely v Warden, 401 U.S. 560 (1971). There, the Sheriff of Carbon County, Wyoming complained to a magistrate against two named men as the perpetrators of a crime. The magistrate issued an arrest warrant on the basis of the conclusionary complaint of the Sheriff and a radio bulletin was broadcast. The Laramie Police, relying on the radio bulletin, arrested the two men. The State of Wyoming argued in that case, as does New York State in this case, that the arresting officers were performing their duties free of illegality when they themselves made the arrest on the basis of a communication from fellow officers, and that to prevent arresting officers from assuming that their fellow officers' gained information by lawful means would "unduly hamper law enforcement." This Court held in the arrest must fall:

"We do not, of course, question that the Laramie police

*The New York Courts assumed petitioner's standing to object to the California search. Simmons v United States, 390 U.S. 377 (1968); Jones v United States, 362 U.S. 257.

> were entitled to act on the strength of the radio bulletin. Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the investigating officer to rely on fellow officers to make the arrest. Whitely v Warden, supra at 568.

Thus, from petitioner's point of view, his arrest, conviction and sentence are the result of California and New York police action working as one authority, and to say there was no collusion between them is to fly in the face of the actualities. Detective Tobin testified in New York that he had a working relationship with Sergeant McKnight in California and that all his information on this case came from Sergeant McKnight. The rationale of the Whitely case is that illegal police action may not be justified to dilute the exclusionary rule simply by fragmenting that working relationship into separate counties or separate states or separate police officers. The California Supreme Court had determined that its police acted contrary to the Fourth Amendment with respect to property sought to be used as evidence against petitioner; Full Faith and Credit to that determination, together with the mandate of Mapp v Ohio, 367 U.S. 643,655 (1961) "that all evidence obtained by searches and seizures in violation of the Constitution is by that same authority inadmissable in a state court", required the suppression of the evidence in New York. United States Constitution, Art. 4, Sec. 1.

II

The New York Court of Appeals found, "to be sure, when Tobin (New York Detective) placed the cartons under surveillance and subsequently arrested defendant, he

undoubtedly relied on all the information from Sergeant McKnight (California police)", but the Court proceeded to base its decision on what Detective Tobin might have done had he not received *all* his information from Sergeant McKnight. The Court hypothesized that Detective Tobin could have made the arrest and seizure in New York had he received information directly from Richard Dunkel the airlines clerk who, under California police auspices, made a "private" search of the packages. The Court of Appeals using a hypothetical set of facts, instead of the actual case presented to it, misapplied this Court's rule on independent untainted evidence, Wong Sun v United States, 371 U.S. 471 (1963). "The test must be one of actualities, not possiblities." United States v Paroutian, 299 F 2d 486, 489 (2d Cir., 1962).

The actualities here are that the New York police obtained their information, all of it, and all of their evidence from the California police, who during their search of the packages without a warrant, made the definite determination the packages contained marijuana. They opened one package themselves, seized some of the marijuana, replaced it with sand and sent the altered materials to New York. There was no other source for the New York police action. What the New York police might have done had Richard Dunkel, the airlines clerk in California called them directly before he called the Los Angeles police, is not this case, and cannot excuse the actual illegality, the intervening tainted source by which the evidence was secured. This Court has said as much with reference to evidence seized after a search without a warrant, despite the existence of probable cause.

> "Belief, however, well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause. Agnello v United States, 269 U.S. 20, 33 (1925); Taylor v United States,

286 U.S. 1 (1932); Jones v United States, 357 U.S. 393 (1958).

This court has, as in the above cases, repeatedly rejected analysis of the derivative evidence exclusionary rule on the basis of what the police might have done: "(T)he rights...against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way." Silverthorne v United States, 251 U.S. 385, 392 (1920). The evidence obtained must actually have come from an independent source; the independent source may not justify the illegal police action, after the fact. Otherwise, "The better the government's case against an individual the freer it would be to invade his privacy. We cannot accept such a result." United States v Paroutian, supra, at 489. And, in this case, the independent source was merely a construct of the Court of Appeals hearing no relation to the actual source of Detective Tobin's information.

Nor may the search by Richard Dunkel be excused from Fourth Amendment proscriptions in order to serve as an independent untainted source of information in this case. It is clear that the airlines clerk was acting pursuant to previous conversation with the police during which they exhorted him to be on the lookout for marijuana in packages brought to him by "hippie types", and that his search was not authorized by his superiors as a legitimate carrier inspection. This search was made solely for the purpose of aiding the police in criminal prosecution, and the police must take responsibility for the consequent invasion of Fourth Amendment rights occasioned by their request. Corngold v United States, 367 F. 2d 1 (9th Cir. 1966). cf. Gambino v United States 275, U.S. 310 (1927). In the same way, evidence illegally seized by an employee of a corporation was suppressed because the documents were stolen for the purpose of aiding a Commission in a pending prosecution, and the Commission knowingly gave its approval to the employee's act by its use

of the evidence. Knoll Associates, Inc. v Federal Trade Commission, 397 F. 2d 530 (7th Cir., 1969). Further, superiors may search an employee's desk to find materials for office purposes but they may not consent for the employee to a police search for the fruits of crime. United States v Blok, 188 F. 2d 1019 (D.C. Cir., 1951). And a parole officer may search a parolee's dwelling without a warrant during the performance of his duties as a parole officer, but he must obtain a warrant if he does so on the request of law officers: "The parole office is in such a case acting nor as the supervising guardian, so to speak, of the parolee, but as the agent of the very authority upon whom the requirement for a search warrant is constitutionally imposed." Smith v Rhay, 419 F. 2d 160, 162-163 (9th Cir., 1969); cf. United States v Small, 297 F. Supp. 582 (D.C. Mass, 1969). Thus, neither the private - public search distinction (Burdeau v McDowell, 256 U.S. 465 (1921), nor the distinction between police Jurisdiction should be applied when to do so is to permit the circumvention of the mandates of the Fourth Amendment on actual police conduct. Had Richard Dunkel called the New York police directly, he would have been doing so as an agent of the Los Angeles police; and as such, his search of the packages without a warrant was unlawful, the information thus transmitted to New York could not justify the police action there, either in hypothesis or in fact.

III

This Court has recently reaffirmed the necessity of the warrant as the cornerstone requirement of the reasonable search and seizure, and the per se unreasonableness of searches and seizures conducted without that protection.

> "....no amount of probable cause can justify a warrantless search or seizure absent exigent circumstances."
>
> "..where the discovery is anticipated when the police

know in advance the location of the evidence... the requirement of a warrant to seize proposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as 'per se unreasonable' in the absence of exigent circumstances." Coolidge v New Hampshire, 403 U.S., 443, 468, 470-471 (1971); cf. United States v Van Leeuwen, 397 U.S. 249 (1970).

There were no exigent circumstances in this case. The police knew the night before that the packages would arrive at Kennedy airport the next day. They had the package under continuous observation from the moment it arrived until the arrest of petitioner, sixteen hours later. The package was in the safekeeping of the airlines shipping authorities, in no danger of destruction. Sometime during those sixteen hours, or even after the phone call from the California police the night before, the New York police could have obtained a warrant.

The holding of the New York Court of Appeals herein that "No arrest warrant was necessary since the Dunkel information and the odor of marijuana gave Tobin probable cause to believe that a crime was being committed in his presence (citing only New York statute)", (See appendix, p. B-4) is in direct conflict with this Court's statement in Cooledge, supra, "No amount of probable cause can justify a warrantless search or seizure absent exigent circumstances' ". No such circumstances are shown in this case, and the argument that the odor of marijuana revealed the contraband in plain view does not justify the seizure absent thosecircumstances. "This Court has never permitted the legitimation of a planned warrantless seizure on plain view grounds..." Cooledge v New Hampshire, supra, at 417 n 27.

IV

Petitioner was convicted of possession of marijuana without evidence that he knew the package he was carrying contained that substance. The address on the package contained the name of another man in care of petitioner, who was apparently delivering it to that man after picking it up at Kennedy Airport. Despite the New York Court of Appeals reliance on the words of the Illinois Supreme Court that:

> "The inference (of knowledge from mere possession) is based largely upon the nature of the commodity and the manner in which its illegal traffic is conducted... They are sold for exorbitant sums and are therefore of great value to person (sic) possessing them. Furthermore, since their mere possession may subject such person to severe criminal consequences, the narcotics traffic is conducted with the utmost secrecy and care..." (People v Nettles, 23 Ill 2d 306, 308).

We submit this as mere speculation. The inference is equally possible, based on all of the above, that the man with actual knowledge of the carton's contents would ask an innocent agent to retreive the package from the airport in order to protect himself from just the eventuality that brings petitioner herein before this Court. And, it may not be argued that petitioner has the duty to produce the man with actual knowledge, since that duty arises only once the presumption is assumed valid. Neither resort to human experience nor empirical data can supply the substantial assurance that at least in a majority of instances, wherein one man arrives at an airport or post office to claim mail addressed to another and has not had opportunity to actually discover what is in the package, that this man would have knowledge of the contents of the package. To so presume and to so convict on such a presumption is to deprive petitioner of a fair trial and due process of law. Leary v United States, 395 U.S. 6 (1969).

CONCLUSION

FOR THE ABOVE STATED REASONS A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE JUDGMENT AND OPINION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Respectfully submitted,

ARTHUR W. LONSCHEIN,

APPENDIX A - REMITTITUR

No. 231 Form 6

Court of Appeals

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 18th day of November in the year of our Lord one thousand nine hundred and seventy-one, before the Judges of said Court.

WITNESS,
The HON. STANLEY H. FULD,
Chief Judge, *Presiding.*
RAYMOND J. CANNON, *Clerk.*

Remittitur November 18, 1971.

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2. No. 231. 71

The People &c.,

Respondent,

vs.

Joel Bernard Reisman, & c.,

Appellant.

BE IT REMEMBERED, That on the 10th day of May in the year of our Lord one thousand nine hundred and seventy-one, Joel Bernard Reisman, &c., the appellant – in this cause, came here unto the Court of Appeals, by Arthur W. Lonschein, his attorney –, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People &c., the respondent – in said cause, afterwards appeared in said Court of Appeals by Thomas J. Mackell, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Arthur W. Lonschein, of counsel for the appellant-, and by Mr. Cornelius J. O'Brien, of counsel for the respondent-, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced

according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

s/ Raymond J. Cannon
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office,
Albany, November 18, 1971.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

s/ Raymond J. Cannon
Clerk.

[SEAL]

FILED
County Clerk, Queens County
At Supreme Court, Queens County
Criminal Court Building
Kew Gardens, N.Y.
'71 Dec. 1 PM 2:57

Appendix B - Opinion

THE PEOPLE OF THE STATE OF NEW YORK, respondent, v. JOEL BERNARD REISMAN, &C., appellant.

Decided Nov. 18, 1971.

Before *Fuld, Ch.J.; Burke, Scileppi, Bergan, Breitel, Jasen* and *Gibson, JJ.*

Breitel, J. – Following a jury trial, defendant was convicted of possession of a dangerous drug in the first degree pursuant to Penal Law, section 220.20. The crime arose from his receipt of forty-six pounds of packaged marijuana at Kennedy International Airport.

The principal issue is whether the marijuana seized following defendant's arrest should have been suppressed because some information leading to the arrest was improperly obtained by California police officers in another prosecution. Another important issue is whether defendant's possession of the marijuana is sufficient to infer his knowledgeable possession. A pre-trial hearing had been conducted on defendant's motion to suppress the seizure of this and other marijuana found in a vehicle used by defendant.

The conviction should be affirmed. The New York surveillance and arrest did not depend necessarily in whole or in part on the purportedly illegal California police search. The motion to suppress was properly denied. There was independent and untainted cause, an airline employee's information, for the California police to advise the New York police whose independent confirmatory observations resulted in defendant's physical possession, by consignment, delivery and acceptance, was warrant for the jury to infer his knowledge.

Richard Dunkel, a customer service agent for American Airlines at Los Angeles International Airport, became suspicious of two cartons delivered to the terminal by one Peter Abt. The cartons had been left for shipment to New York's Kennedy Airport, consigned to George Carlton, care of defendant, Tanker Reisman. Acting under tariff regulations, Dunkel slit the larger of the two cartons and observed what, from his previous experience, he believed to be marijuana. The Los Angeles police were notified and without a search warrant inspected the contents and confirmed Dunkel's discovery. One of the cartons was emptied of its contents, refilled with sand, and both cartons were sent on their way. At 11:30 P.M., that evening, Sergeant McKnight one of the officers involved, telephoned Detective Michael Tobin of the New York City police, for twelve years a member of its narcotics bureau. According to Detective Tobin, McKnight told him that marijuana was on its way to Kennedy Airport. "We have already got some out. The airline employee found it."

Equipped with defendant's name, the air flight number, arrival time, and air bill number, Detective Tobin went to Kennedy Airport the following morning. At 7 A.M., the two described cartons arrived. They were marked "George Carlton in care of Tanker Reisman." Detective Tobin approached close to the shelved cartons and detected a strong odor of marijuana. He did not open the cartons but kept them under surveillance.

That evening at about 11 P.M., defendant Reisman appeared at the airlines terminal and approached Detective Tobin who was attired in an American Airlines uniform. Upon stating that he wished to claim certain packages, Tobin directed him to the flight agent. Defendant identified himself and signed the air bill, while Tobin accompanied him. Apparently from a distance, defendant picked out the appropriate packages. The detective,

assisting Reisman, then carried one of the cartons, containing the sand, to the parking lot when he was intercepted by a companion of Reisman who insisted upon carrying the carton the rest of the way to an automobile. Tobin surrendered the carton and waited for both men to reach the car. He then arrested both men, seized the two cartons, and made further searches with the assistance of two federal agents. A search of Reisman produced a paper with the notation "No. 6615254, To George Carlton, care of me [Reisman], N.Y.C. hold American No. 10643 to 830," and a check made out to Reisman and endorsed by him to Peter Abt, the consignor. The search of the car disclosed small quantities of marijuana. The possession of small quantities, the subject of the second count of the indictment for drug possession in the second degree, is no longer relevant since both defendants, Reisman and his companion, were acquitted on that charge.[1]

At the suppression hearing defendant argued that the surveillance, interception, and arrest resulted directly from the unlawful search in California, by Sergeant McKnight of the Los Angeles police. Defendant urged that the illegal police activity in California resulted in the seizure in New York of the remaining carton of marijuana, and therefore required its suppression. Reisman relied on a California Supreme Court order in the California prosecution of the consignor Abt determining that Sergeant McKnight's search was illegal not for absence of probable cause but for lack of a warrant when the circumstances permitted obtaining one (Abt v. Superior Court, 1 Cal. 3d 418).

The suppression court in denying the motion accepted the illegality of the search by the Los Angeles police. It held, however, that the prior unofficial search by the airlines employee at the Los Angeles airport was an untainted and

independent basis for transmitting the information to New York City and prompting police surveillance in this state.

Upon the trial defendant Reisman was convicted of the felony possession charge and his co-defendant acquitted. As noted earlier, both defendants were acquitted of the charge related to the small quantity of marijuana found in the automobile. In acquitting the co-defendant of all charges, the jury probably accepted his testimony that he was only doing Reisman a favor in accompanying him and believed the cartons to contain men's and women's clothing. Reisman did not testify.

It would be unrealistic to atomize the several facts relied upon by the New York police as influential in making the arrest and incidental search. To be sure, when Tobin placed the cartons under surveillance and subsequently arrested defendant, he undoubtedly relied on all the information from Sergeant McKnight. But he would have similarly responded if only the Dunkel information had been transmitted. Tobin, in either event, would have intercepted the cartons at the airport the following morning. An outward inspection of the marijuana carton with its telltale odor associated, by experience, with marijuana would have prompted surveillance and justified the ensuing arrest. No arrest warrant was necessary since the Dunkel information and the odor of marijuana gave Tobin probable cause to believe that a crime was being committed in his presence (former Code Crim. Pro., sec. 177, subdiv. 1; now CPL, sec. 140.10). The arrest being based on probable cause, the police were entitled to seize the contraband known to them to be such, and continuously within their observation (People v. Gallmon, 19 N.Y. 2d 389, 394; Harris v. United States, 390 U.S. 234, 236).

The presence of independent untainted information distinguishes this case from *Silverthorne v. United States* (251 U.S. 385), and *Nardone v. United States* (308 U.S. 388) which incepted the exclusionary derivative evidence rule. Independent untainted evidence establishing probable cause for police conduct will sustain the arrest or seizure even if there has been antecedent illegal conduct by the police (Wong Sun v. United States, 371 U.S. 471, 487-488; Silverthorne v. United States, supra, at 392). Indeed, when, as in this case, the untainted information "would have inevitably resulted" in the New York surveillance, and then the arrest and seizure, the rule with its appendant exception is more than satisfied (Wayne v. United States, 318 F. 2d 205, 209 [Burger, Ch.J.], cert. den. 371 U.S. 814; United States v. Hernandez, 353 F. 2d 624, 628, cert. den. 384 U.S. 1008).

The result is eminently sensible. The New York police should not be handicapped by police illegality in another jurisdiction which is not "necessarily responsible" for the present prosecution, that is, is not an essential ingredient to the New York prosecution. Moreover, in the absence of collusion between the police of the two jurisdictions, the exclusion of the otherwise properly obtained New York evidence serves no legitimate purpose.

Defendant also contends that the suppression order of the California court in the prosecution of Peter Abt, the consignor of the cartons, was not given the required full faith and credit in the present proceeding. Res judicata, as distinguished from other procedural bars to the relitigation of crimes or particular issues, is not applicable to criminal prosecutions in quite the same way as that body of doctrine is applicable to civil cases (see, generally, Ann., Res Judicata—Criminal Cases, 9 ALR 3d 203). On any view, neither direct nor collateral estoppel is established by this record. Identity of the prosecuting party is

an indispensable precondition to the invocation of either kind of estoppel (People v. LoCicero, 14 N.Y. 2d 374, 380; United States v. Feinberg, 383 F. 2d 60, 71; Ann., 9 ALR 3d, at pp. 215-218, supra). There is equally absent an identity of issues, also required for estoppel (id.). Indeed, the suppression court in New York assumed the illegality of the California search, but the question in this case turned on the effect which that illegality would have, if any, on the subsequent New York police conduct. That, of course, was never before the California court.

Conceding transitory manual possession of the packaged contraband, defendant argues that the prosecution failed to establish knowledgeable possession. Proof of such possession, defendant urges, is equally consistent with defendant's lack of knowledge of the contents, and therefore the indictment should have been dismissed.

The crime of possessing dangerous drugs requires a physical or constructive possession with actual knowledge of the nature of the possessed substance (Penal Law, secs. 220.05-220.20). Knowledge, of course, may be shown circumstantially by conduct or directly by admission, or indirectly by contradictory statements from which guilt may be inferred (see, e.g., People v. Groom, 60 Cal. 2d 694, 696; People v. Embry, 20 Ill. 2d 331, 332; 72 C.J.S. Poisons, sec. 7[c] [2]). Generally, possession suffices to permit the inference that the possessor knows what he possesses, especially, but not exclusively, if it is in his hands, on his person, in his vehicle, or on his premises (e.g., Wigmore, Evidence [3d ed.], secs. 244-245, 260; cf. Kuchlik v. Feuer, 239 App. Div. 338, 339). This, of course, is an elemental inference based on common experience and all but universal probabilities. Thus it is an accident rule of inference or rebuttable presumption of fact that the recent and exclusive possession of the fruits of any crime warrants the inference of

guilt, including, when material, knowledgeable possession (Wigmore, op. cit., supra, secs. 152, 2513; Richardson, Evidence [9th ed.], sec. 88, and cases cited). In the case of contraband its possession is a crime per se, and hence the inference of guilt, that is, knowledgeable possession, is as strong as is the case, for instance, with stolen goods (e.g., People v. Roman, 12 N.Y. 2d 220, 222; People v. Berger, 260 App. Div. 687, 689-690, aff'd 285 N.Y. 811; Wigmore, op. cit., supra, sec. 152; Richardson, loc. cit., supra).

By statutes or decisional precedents the rule and variants have been applied to dangerous drugs (see, e.g., U.S. Code Annot., tit. 21, sec. 174, repealed 84 U.S. Stat. 1291; U.S. Code Annot., tit. 26, sec. 4744, repealed 84 U.S. Stat. 1292; N.Y. Penal Law, sec. 220.25; People v. Nettles, 23 Ill. 2d 306, 308; People v. Cirilli, 71 Cal. Rptr. 604, 608; People v. Hokuf, 53 Cal. Rptr. 828; Wong Sun v. United States, supra, at p. 493; 72 C.J.S., Poisons, sec. 7[c][1]).[2] The statutory presumptions are without validity unless the probabilities based on experience and proof justify them (Leary v. United States, 395 U.S. 6, 32-36; People v. McCaleb, 25 N.Y. 2d 394, 400-404). Consequently, it makes no significant difference for this purpose whether knowledge is presumed by statute or inferred by reasoning without the benefit of statutory presumption. In either event, the probabilities must justify the one or the other, although the probabilities to support a statutory presumption, it has been said, need not be as great as to support an inference in a criminal case (cf. People v. McCaleb, 25 N.Y. 2d, at 400-403, supra).

Moreover, the foregoing reasoning is particularly applicable to dangerous drugs as the Illinois court said so aptly, albeit with reference to possession in premises rather than on the person:

"[W]here narcotics are found on premises under

defendant's control, it may be inferred that the defendant had both knowledge and control of the narcotics. The inference is based largely upon the nature of the commodity and the manner in which its illegal traffic is conducted.... They are sold for exorbitant sums and are therefore of great value to person possessing them. Furthermore, since their mere possession may subject such person to severe criminal consequences, the narcotics traffic is conducted with the utmost secrecy and care. Human experience teaches that narcotics are rarely, if ever, found "unaccountably in a person's living quarters" (People v. Nettles, 23 Ill. 2d 306, 308).

Indeed, the language applies with even greater force to possession on or about the person.

The probabilities justifying the inference of knowledge in this case are unusually impressive. The marijuana was in defendant's hands when he accepted delivery. This under the rules is sufficient to permit the inference of knowledge subject, of course, to rebuttal by countervailing proof. But there was much more in this case. The consignment was made in care of defendant. It is significant defendant had on his person a check endorsed over as payable to the consignor. Defendant accepted delivery on the consignment which together with the check established that the transaction was one of which he had full awareness. Moreover, defendant claimed the packages as his apparently before he was near enough to read or identify their markings. It could not be one of those rare instances where one may receive and accept a package unanticipated from an unknown sender.

For a residual issue, defendant requested a charge of the misdemeanor of criminal drug possession in the fourth degree, a crime which does not require any particular minimum quantity

of the drug (Penal Law, former section 220.05, as enacted by L. 1965, ch. 1030). Interestingly, defendant had previously and successfully moved to have the fourth count of the indictment, criminal possession in the fourth degree, dismissed. Possession in the first degree (Penal Law, sec. 220.20, as enacted by L. 1965, ch. 1030) depended on the quantity of the drug involved. The weight of the contraband in the carton was uncontradicted. Moreover, the nature of the case and its circumstances depended entirely on a commercial-like shipment of the large quantity. Consequently, under no view of the facts, because there was no basis in any of the evidence, could the jury find the accused innocent of the higher crime and yet guilty of the misdemeanor which required no minimum quantity (People v. Asan, 22 N.Y. 2d 526, 530; People v. Malave, 21 N.Y. 2d 26, 28-29; People v. Mussenden, 308 N.Y. 558, 563; People v. Clemente, 285 App. Div. 258; 274-278 [dis. op.], aff'd 309 N.Y. 890).

Accordingly, the order of the Appellate Division should be affirmed.

All concur.

(1) Two days later, while defendant Reisman was in custody, Detective Tobin received information from American Airlines at LaGuardia Airport that two metal cartons had arrived also consigned to Carlton care of defendant Reisman. Tobin opened the containers, without a warrant, and discovered 100 bricks of marijuana weighing 270 pounds. This evidence, however, was not offered on the trial, although the suppression court had allowed its introduction.

(2) But cf. People v. Ackerman, 10 Cr.L. Reporter 2063 (Ill. App. Div.).

Order of Supreme Court of New York, Appellate Division
Entered on October 19, 1970

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on October 19, 1970

HON. SAMUEL RABIN — Acting Presiding Justice
HON. JAMES D. HOPKINS
HON. M. HENRY MARTUSCELLO — Associate Justices
HON. HENRY J. LATHAM
HON. ARTHUR D. BRENNAN

(Same Title)

In the above entitled action, the above named Joel Bernard Reisman, etc. defendant in this action, having appealed to this court from a judgment of the Supreme Court, Queens County, rendered May 13, 1969; and the said appeal having been argued by Arthur W. Lonschein, Esq., of counsel for the appellant, and by Cornelius J. O'Brien, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is;

ORDERED that the judgment appealed from is hereby unanimously affirmed.

Enter: HERMAN M. POGUL
Clerk of the Appellate Division

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IN THE

Supreme Court of the United States

October Term, 1971

No. 1029 71-1020

JOEL BERNARD REISMAN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1971

No. 1029

JOEL BERNARD REISMAN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR RESPONDENT IN OPPOSITION

Introduction

This is a brief in behalf of respondent in opposition to a petition for a writ of *certiorari* to the highest court of the State of New York, the Court of Appeals.

Petitioner was convicted of the crime of Criminal Possession of a Dangerous Drug in the First Degree after a

trial before Mr. Justice Peter F. Farrell and a jury in the Supreme Court of the State of New York, County of Queens. Judgment of conviction was rendered on May 13, 1969, and petitioner was sentenced to a term of imprisonment not to exceed five years.

Opinion Below

The intermediate appellate tribunal below affirmed the conviction on October 19, 1970, without opinion. The memorandum of that court—the Supreme Court of the State of New York, Appellate Division, Second Department—is reported at 35 A.D. 2d 281 (1970).

On November 18, 1971, the Court of Appeals of the State of New York, in an opinion by Judge Charles D. Breitel, unanimously affirmed the order of the Appellate Division. The opinion of the Court of Appeals (Appendix B of Petition) is reported at 29 N.Y. 2d 278 (1971). Judgment was entered on or about December 1, 1971.

Jurisdiction

The jurisdiction of this Court to review, by way of *certiorari*, is invoked under 28 U.S.C. §1257(2).

Questions Presented

1. Whether the doctrine of "fruit of the poisonous tree" is applicable when the information that predicated the seizure originated from a private search but was confirmed by an illegal police search?

2. Whether a conclusion of fact based upon the concession of a litigant which forms the basis for a decision in the state court may be now challenged by petitioner and presented for review by this Court?

3. Whether the suppression of evidence in one state requires suppression by a second state despite the untainted and wholly lawful search by the officer in the second state?

4. Whether the evidence at bar was so lacking so as to deprive petitioner of his rights to a fair trial and to due process of law?

Statement of the Case

On February 11, 1968 at 11:00 P.M. Detective Michael Tobin of the Narcotics Bureau of the New York City Police Department received a telephone call from Sgt. Fred McKnight of the Los Angeles Police Department (T 24, 26).* McKnight had previously given Tobin reliable information on numerous occasions, information that had ultimately resulted in convictions (H 5).** McKnight told him that two cartons were coming from Los Angeles to New York. He said that the larger carton was filled with 23 bricks of marijuana and that he had seized the contents of the other carton and replaced it with sand (H 42). The material McKnight seized was also marijuana (H 43).

Tobin was told by McKnight that an airline employee had originally found the marijuana. Neither man made

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*"T" numerical references are to Trial Minutes.

**"H" numerical references are to Suppression Hearing.

any mention of a search warrant (H 44). McKnight also told him the name of the consignee, the flight number, the arrival time and the number on the air bill (H 48-49).

The following morning Detective Tobin went to American Airlines Building No. 82 at John F. Kennedy Airport, arriving there at 6:30 A.M. (H 7, T 27). He had no warrant (H 28). An airline employee loaned him an American Airlines coat (T 90-91). At 7:00 A.M., two cartons arrived at the airport that conformed with the information received from McKnight (H 7). The packages were consigned to George Carlton, care of Tanker Reisman (H 7). They were marked "Hold for pick up" (H 37, T 27).

Detective Tobin remained in the area so that the packages never left his custody, but he made no effort to open the packages until after the arrest (H 8). He was, however, able to detect an odor of marijuana emanating from one of the boxes (H 29-30). At 11 P.M. that night petitioner approached Tobin and said he wanted to claim some packages (H 9).

Tobin accompanied petitioner to the freight agent and heard him say "My name is Tanker Reisman. I came to claim some packages". Petitioner then signed the airbill (H 10). Petitioner gave Tobin a copy of the airbill and as they approached the area, petitioner pointed to the packages that belonged to him (T 34). Detective Tobin verified this by comparing the airbill with the packages and then suggested that petitioner get his car and bring it to the bay. Petitioner said that he would carry the package. Detective Tobin then returned the airbill to the petitioner and the two men each picked up a package (T 36).

As they left the area the co-defendant Di Erano approached them and offered to carry Tobin's package (T 37). Detective Tobin knew nothing about Di Erano at this time. Di Erano insisted on taking the package and finally pulled it from Tobin's grasp (T 37). It turned out that Di Erano's package was filled with sand (T 148).

Tobin observed petitioner and Di Erano walk to their car, a 1965 maroon Pontiac. As petitioner and Di Erano were putting the cartons in the car, Detective Tobin placed them under arrest and seized the cartons (H 15). A search of the petitioner turned up various papers and a telephone book (T 40-74). The phone book contained information that conformed to the airbill and made no mention of marijuana (T.77, 134).

When Tobin entered the door of the car he was able to smell a distinct odor of marijuana smoke. Subsequently, he discovered a manila envelope containing a small quantity of marijuana (T 41). He also discovered some cigarette paper (T 60).

Tobin brought the defendants back to the building and opened the packages in their presence. The larger package contained 23 bricks of marijuana wrapped in tinfoil (H 34, T 100). The second package contained a plastic bag filled with sand (T 52). A chemist testified that the larger carton contained a total of 45 pounds and ½ ounce of marijuana and that the envelope recovered from the car contained ¼ of an ounce plus 27 grains of marijuana (T 278-279, 282).

Petitioner was convicted of criminal possession of a dangerous drug in the first degree and acquitted of criminal possession of a dangerous drug in the second degree. Di Erano was acquitted of all charges.

ARGUMENT

POINT ONE

The Court of Appeals properly ruled that the "fruit of the poisonous tree" doctrine was inapplicable to the case at bar and that Detective Tobin effected a lawful arrest and seizure.

The petitioner argued in the New York courts that Detective Tobin's actions were rendered unlawful by the illegal action taken by the Los Angeles Police Department. He contended that all of the evidence unearthed by Tobin is inadmissible as being "fruit of the poisonous tree" in that he acted solely as a result of information unlawfully obtained by the California search. *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

The Court of Appeals rejected that argument. They held that Dunkel's original discovery constituted independent and untainted information upon which Tobin could proceed, and under those circumstances, his actions should not be impaired by the illegal act of the California police. *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1919) [Petition, pp. B-4, B-5].

Petitioner contends in this Court that the Court of Appeals predicated its decisions upon the hypothetical circumstances "that Detective Tobin could have made the arrest and seizure in New York had he received information directly from Richard Dunkel * * *" (Petition, p. 11). This, the petitioner urges, was error on the part of the Court of Appeals, because what actually did happen was

that Tobin in fact received the information, not from Dunkel, but from the California police, and that the "test must be one of actualities not possibilities." *United States* v. *Paroutian*, 299 F. 2d 486, 489 (2d Cir., 1962) [Petition, p. 11].

Petitioner misconstrues the basis of the Court of Appeals' decision. Judge Breitel took pains to point out that when the California police called Detective Tobin, he was told that "We have already got some out. The airline employee found it" (Petition, B-2). He went on to base his decision not, as the petitioner suggests, upon the hypothetical of what Tobin might have done "had he received information directly from Richard Dunkel" (Petition, p. 11), but rather upon the fact that Tobin was not only told about the California search by the police, but that the marijuana had been discovered by the airline employee. It was this latter fact which gave Tobin "independent untainted information" upon which he could lawfully proceed (Petition, B-4, B-5).

This decision was clearly consistent with the standards established by Justice Holmes in *Silverthorne*, *supra*, wherein he wrote:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If *knowledge* of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used * * *. *Silverthorne Lumber*

Co. v. *United States*, 251 U.S. 385, 392 (1919). (Emphasis added.)

In the case at bar, it is irrefutable that no new knowledge was gained by the illegal police search. Rather, it merely confirmed the discovery made initially and *independently* by Dunkel. Hence in no way can it be said that Tobin was taking advantage of *knowledge* illegally obtained and as such the "fruit of the tree" doctrine is improperly applied to the instant circumstances.

Petitioner also contends that, irrespective of the impact of the California search, Tobin's subsequent response thereto was unlawful because he failed to obtain a warrant (Petition, pp. 13-14). This contention has no merit. Detective Tobin had the right to arrest petitioner without a warrant because he had probable cause to believe he had committed a felony [former Code of Criminal Procedure, (McKinney's Consol. Laws, Vol. 66, Sec. 177 [1]); *Carroll* v. *United States*, 267 U.S. 132, 156 (1925)]. Having made a lawful arrest, he then had a right to make a search contemporaneous thereto and to seize the contraband that the search produced. *Carroll, supra*, 267 U.S. 132 (1925); *United States* v. *Rabinowitz*, 339 U.S. 56 (1950); *Chimel* v. *California*, 395 U.S. 752 (1969).

Notwithstanding petitioner's suggestion, nothing in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), detracts from the legality of Tobin's actions. First, Mr. Justice Stewart pointed out that the seizure in *Coolidge* did not fall within the accepted bounds of search contemporaneous with a lawful arrest and as such there was no need for the

Court to grapple directly with the constitutional issues that that doctrine presented [*Coolidge, supra,* 403 U.S. 443, 91 S. Ct. 2022, 2032-2033 (1971)]. Secondly, the Court at several junctures pointed out that what was being said in *Coolidge* was not inconsistent with *Chimel, supra,* 395 U.S. 752 (1969), and that *Chimel* is still the law (cf., *Coolidge, supra,* 403 U.S. 443, 9 S.Ct. 2022, 2033 n. 11, 2038 n. 24, 2046). What the *Coolidge* case did do was hold that "the police must obtain a warrant when they intend to seize an object outside the scope of a valid search incident to arrest," *supra,* 403 U.S. 443, 91 S.Ct. 2022, 2047 (1971). Tobin's seizure was well within the bounds of *Chimel, supra,* 395 U.S. 752 (1969) and hence not subject to the warrant requirement.

POINT TWO

Petitioner's concession in the state court that Dunkel's search was that of a private citizen and not subject to Fourth Amendment proscription precludes him from contending in this Court that Dunkel acted as an agent of the police.

Petitioner contends that the initial intrusion in California made by Richard Dunkel was itself subject to the proscriptions of the Fourth Amendment in that Dunkel allegedly acted as an agent for the Los Angeles Police Department. (Petition, pp. 12-13). This contention is being raised for the very first time in this Court. Moreover, petitioner specifically conceded the fact that Dunkel's search was a private search within the meaning of *Burdeau* v. *McDowell,* 256 U.S. 465 (1921), at every preceding stage

of the litigation.* Respondent submits that petitioner's contention in this regard must be disregarded by this Court.

Whether an agency relationship exists between parties is clearly a question of fact (3 C.J.S. 323). The decision of the trial court depended in part upon the conclusion that Dunkel's acts were those of a private citizen. That conclusion was preceded by an express concession of that issue by defendant-petitioner in his supporting memorandum of law. The decisions of the Appellate Division and the Court of Appeals were similarly dependent thereon. This Court is therefore precluded from reviewing the question.

> "Where the state trial court reaches a conclusion from the facts found, and owing to the concession of counsel on both sides that such conclusions were correct, the state appellate court decides the case on that hypothesis, it is not open to the parties to seek a review by the Supreme Court of the facts under a contention that they do not justify the conclusion reached." [Wolfson & Kurland, *Robertson & Kirkham Jurisdiction of the Supreme Court of the United States* (1951)].

It was on this basis that this Court refused to review the propriety of a conclusion of fact made by the trial court in *Texas & Pacific Railway Company* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 434-435 (1906). In that case, the appellate briefs conceded the propriety of the trial court's conclusion as to a question of fact, and confined the issue on appeal in the state court to the correctness of the con-

* Supreme Court of the State of New York, Criminal Term—see defendant-petitioner's Memorandum of Law in Support of a Motion to Suppress, pp. 17-18; Supreme Court of the State of New York, Appellate Division—see appellant-petitioner's brief, p. 30; Court of Appeals of the State of New York—see appellant-petitioner's brief, p. 19.

clusions of law derived therefrom. When an attack was made on the very issue of fact conceded to in the state courts, this Court held that such an attack was unavailable to the appellant.

Since in the case at bar the history of the litigation with respect to the issue of agency is precisely analogous to the circumstances in the *Texas & Pacific Railway, supra,* 204 U.S. 426, 434-435 (1906) case, respondent respectfully submits that petitioner is bound by that decision and is precluded from raising this issue. For the purposes of this petition, Dunkel's actions must be considered those of a private citizen and hence not subject to Fourth Amendment proscription. *Burdeau* v. *McDowell,* 256 U.S. 465 (1921).

POINT THREE

The Court of Appeals applied the findings of fact to its decision in a manner completely consistent with the Constitution as reflected in the decisional law of this Court.

The petitioner contends that the Court of Appeals' decision in this case made inroads into existing Supreme Court standards of search and seizure. He suggests that the decision implies that the police departments of sister states are now free to conspire to circumvent the Fourth Amendment by making illegal searches and then allowing another state to use the fruits thereof, in direct conflict with the spirit of *Elkins* v. *United States,* 364 U.S. 206 (1960). He further suggests that the New York courts failed to give full faith and credit to the California Supreme Court's

decision in *Abt* v. *The Superior Court of Los Angeles County*, 82 Cal. Rptr. 481 (Petition, pp. 8-10).

The issue of full faith and credit may be disposed of summarily. Full faith and credit cannot be accorded to a judgment of one state court unless that state court had jurisdiction over the parties to the litigation in the second state. Since neither petitioner nor respondent herein were subject to the jurisdiction of the California courts in *Abt, supra*, 82 Cal. Rptr. 481, full faith and credit is inapplicable to the case at bar. *Riley* v. *New York Trust Co.*, 315 U.S. 343, 348-349 (1942); *B.R. Dewitt, Inc.* v. *Hall*, 19 N.Y. 2d 141 (1967); *Schwartz* v. *Public Administrator*, 24 N.Y. 2d 65 (1969). Moreover, as Judge Breitel noted, to the extent that the issues were identical, to wit: whether the police search in California was lawful, the New York courts made a determination consistent with the holding in California.

Petitioner's contention that the Court of Appeals' decision effectively subverted the intent of *Elkins* v. *United States*, 364 U.S. 206 (1960), has no merit. Indeed, respondent submits that the court below did nothing more but apply the standards set forth by this Court in *Silverthorne* v. *United States*, 251 U.S. 385, 392 (1919), to the circumstances at bar in concluding that Dunkel's findings constituted knowledge obtained independently of the legal infirmity. Such a holding is materially distinguishable from either *Elkins, supra*, 364 U.S. 206, or *Wong Sun* v. *United States*, 371 U.S. 471 (1963), since unlike those cases, the New York courts ruled that the New York police were acting upon information received as a result of a private search and, as such, the exclusionary bar is inapplicable. *Burdeau* v.

McDowell, 256 U.S. 465 (1921). It also renders irrelevant the recent Supreme Court decision *Whitely* v. *Warden*, 401 U.S. 560 (1971), since that case, like *Elkins, supra,* and *Wong Sun, supra,* also turns on the accountability of one police officer for the acts of another police officer (Petition, pp. 9-10). Thus the decision of the Court of Appeals was completely consistent with both the Constitution in its own right and the Constitution as reflected in the decisional law of this Court.

POINT FOUR

No constitutional issue arises from petitioner's contention that respondent failed to prove knowing possession.

Section 220.20 of the Revised Penal Law of New York makes it a crime to *knowingly* possess a dangerous drug.

Petitioner contends that his rights to a fair trial and due process of law were violated because the jury apparently inferred knowing possession from the circumstances surrounding petitioner's actual possession (Petition, p. 15). Respondent submits that this question is one of sufficiency of evidence. Such an issue does not rise to constitutional proportions when there is some evidence before the jury fairly tending to sustain the verdict. *Abrams* v. *United States*, 250 U.S. 616 (1919); *Thompson* v. *Louisville*, 362 U.S. 199 (1960); *Garner* v. *Louisiana*, 368 U.S. 157 (1961); see, also, 80 ALR 2d, 1355-1376.

In the case at bar, the petitioner was caught red-handed with a package containing 45 pounds of marijuana. The package was addressed in care of the petitioner. At the

time of the arrest, a small quantity of marijuana was found in the car and the car smelled of burning marijuana. In addition, petitioner was able to pick out the two packages as his own from a distance of ten feet. Clearly, this constituted ample evidence from which the jury could infer knowledgeable possession. In any event, it obviously surpasses the constitutional standards alluded to above.

Finally, *Leary* v. *United States*, 395 U.S. 6 (1969), relied upon by petitioner, is clearly irrelevant (Petition, p. 15). *Leary, supra*, 395 U.S. 6 (1969), deals with the constitutionality of a statutory presumption. No statutory presumption is at issue in this case—rather, it is merely the sufficiency of the evidence which the petitioner challenges. On that issue we submit that Judge Breitel's discussion of the proof of knowledge is dispositive (Petition, pp. B-6, B-8).

Conclusion

The petition for a writ of certiorari should be denied in all respects.

Respectfully submitted,

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